9-105.000
MONEY LAUNDERING

9-105.100 Introduction

The Federal statutes proscribing money laundering were enacted in 1986 with the passage of the Money Laundering Control Act, codified at 18 U.S.C. §§ 1956 and 1957. In order to promote consistency and uniformity in the use of these statutes, certain approval, consultation and notification requirements have been promulgated. These requirements are set forth below. It should be noted that, pursuant to the notification requirement in 9-105.310, copies of all filed indictments and criminal complaints containing money laundering charges must be sent to the Asset Forfeiture and Money Laundering Section regardless of whether the charges required prior approval or consultation with the Section.

The Criminal Resource Manual contains an extensive treatment of the money laundering statutes, with indictment forms and jury instructions, at 2101. A table of contents for these materials is at 2100.

9-105.300 Approval Requirements for Money Laundering Cases

There are four categories of money laundering prosecutions which require prior authorization from the Criminal or Tax Division:

1. Extraterritorial Jurisdiction. Criminal Division (Asset Forfeiture & Money Laundering Section) (AFMLS) approval is required before the commencement of any investigation where jurisdiction to prosecute is based solely on the extraterritorial jurisdiction provisions of §§ 1956 and 1957. Due to the potential international sensitivities, as well as proof problems, involved in using these extraterritorial provisions, no grand jury investigation may be commenced, no indictment may be returned, and no complaint may be filed without the prior approval of AFMLS, Criminal Division when jurisdiction to prosecute these offenses exists only because of these extraterritorial provisions.

2. Tax Division Authorization. Tax Division authorization is required prior to any prosecution under § 1956(a)(1)(A)(ii) where the sole or principal purpose of the financial transaction was to evade the payment of taxes. Such approval shall be given in accordance with the prosecution policies set forth in USAM 9-105.750.

3. Prosecutions of Attorneys. Criminal Division approval is required for prosecutions of attorneys (under either § 1956 or § 1957) where the financial transaction is one involving attorneys' fees. This approval is required regardless of whether the fee was received in a criminal or civil case. Such approval shall be given in accordance with the prosecution policies set forth in USAM 9-105.600 et seq.

4. Prosecution of a Financial Institution. In any criminal case in which a financial institution, as defined in 18 U.S.C. § 20 and 31 C.F.R. § 103.11, would be named as a defendant, or in which a financial institution would be named as an unindicted co-conspirator, AFMLS, Criminal Division approval is required before any indictment or complaint is filed. In cases where the financial institution involved is a "non-bank financial institution," such as a check-cashing service or a casa de cambio, which is a stand-alone business and not a branch of a larger institution, the requirement does not apply. However, when such institutions are part of a larger business or a branch of an international institution, Criminal Division approval is required.

The review and approval function for §§ 1956 and 1957 prosecutions requiring Criminal Division approval has been centralized within the AFMLS. In the case of any prosecution requiring Criminal Division approval under these provisions, a copy of the proposed indictment and a prosecutive memorandum should be sent as soon as possible before the anticipated date of indictment to the Chief of the Asset Forfeiture and Money Laundering Section. The preferred method of transmittal is by overnight carrier. Attorneys are encouraged to seek guidance from the Asset Forfeiture and Money Laundering Section prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review.

9-105.310 Notification of the Asset Forfeiture and Money Laundering Section -- Reporting Requirement

In light of the scope of the money laundering statutes, it is essential that the Asset Forfeiture and Money Laundering Section be kept abreast of the way the statutes are being used. While prior review and approval of all §§ 1956 and 1957 prosecutions are not required, it is necessary that the Asset Forfeiture and Money Laundering Section be advised of all prosecutions under those statutes. Therefore, on October 1, 1992, the following notification requirement was implemented:

> In *all* criminal cases involving charges under § 1956 or § 1957, or in forfeiture cases involving § 981 or § 982, the United States Attorney's Office or Department component handling the case must notify the Asset Forfeiture and Money Laundering Section by sending a copy of the indictment or complaint to the Section as soon as possible after the return of the indictment or the serving of the complaint.

The form which can should be used to transmit the indictment or complaint to the Section can be found in the Criminal Resource Manual at 2184.

Following sentencing, the Assistant United States Attorney or Department attorney should inform the Section of the nature of the disposition of the case.

Prosecutors are encouraged to consult the Asset Forfeiture and Money Laundering Section prior to bringing charges under §§ 1956 or 1957, either by telephone or by submitting a draft indictment or complaint to the Section in advance of the date of filing. Similarly, prior to the filing of a complaint in any civil forfeiture case under § 981(a)(1) when no related criminal indictment under § 1956 or § 1957 will be returned, the prosecutor handling the case is encouraged to consult with the Section.

9-105.320 Reporting Requirements Pertaining to Financial Institutions

Section 1504(c) of the Annunzio-Wylie Anti-Money Laundering Act, which was signed and became effective on October 28, 1992 (except as provided otherwise in the bill), added the following subsection to § 1956:

(g) NOTICE OF CONVICTION OF FINANCIAL INSTITUTIONS.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

In order to implement this requirement, all United States Attorneys Offices or Department components must notify the Asset Forfeiture and Money Laundering Section of such convictions. Attached to the notification letter must be a certified copy of the order of conviction from the court rendering the decision. *See* §§ 1502(a)-(c) and 1503(a)-(b) of the Annunzio-Wylie Act. In addition, the notification should include a file-stamped copy of the indictment, the name of the Assistant United States Attorney who handled the case, and the name of the primary investigative agency involved.

With regard to this notification requirement, three factors should be noted:

First, since this provision was added to § 1956, the relevant definition of the term "financial institution" is that set forth in § 1956(c)(6), which is very broad and includes numerous kinds of businesses other than depository institutions. Based on the prior history of this provision and the context in which it was enacted, it is the position of the Criminal Division that the notification requirement in § 1956(g) be limited to national banks, Federal savings associations, Federal credit unions, federally insured State depository institutions and federally insured State credit unions.

Second, this requirement will apply to persons who were officers, directors or employees of a financial institution either at the time of the offense or at the time of the conviction (i.e., if the offense was committed prior to the defendant's employment at the financial institution).

Third, it should be noted that § 5322 of Title 31 is the penalty provision for violations of other sections of subchapter II of chapter 53 of Title 18 (i.e., §§ 5311-5328); § 5322 does not set out an offense which can be committed. However, we will interpret this provision to include violations of other sections of Title 31 which are punishable under § 5322.

Notifications pursuant to this provision should be sent to: Chief, Asset Forfeiture and Money Laundering Section, Criminal Division. The form which should be used for this notification can be found in the Criminal Resource Manual at 2185.

9-105.330 Consultation Requirements

Consultation with the Criminal Divisions Asset Forfeiture and Money Laundering Section (AFMLS) will provide a means to ensure the orderly development of the case law and to assist prosecutors in applying these statutes in a consistent manner. In the following instances, United States Attorneys' Offices must consult with AFMLS prior to the filing of an indictment or a civil or criminal complaint:

1. Forfeiture of Businesses. In any case where forfeiture of a business is sought under the theory that the business facilitated the money laundering offenses, no forfeiture action, either criminal or civil, may be filed without prior consultation with AFMLS, Criminal Division.

2. Cases Filed Under § 1956(b). Section 1956(b) provides for the imposition of a civil penalty (of not greater than $10,000 or the value of the property, funds, or monetary instruments involved in the transaction) against anyone who violates the criminal provisions of § 1956(a)(1) and (a)(2). In any case where a civil action under § 1956(b) is going to be brought against a business entity, no complaint may be filed without prior consultation with AFMLS, Criminal Division.

3. Cases Involving Financial Crimes. In any case in which the conduct to be charged as "specified unlawful activity" under §§ 1956 and 1957 consists primarily of one or more financial or fraud offenses, and in which the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense, no indictment or complaint may be filed

without prior consultation with AFMLS, Criminal Division. (This issue is often referred to as the "merger" issue.)

Explanation. Sections 1956 and 1957 both require that the property involved in the money laundering transaction be the *proceeds* of specified unlawful activity at the time that the transaction occurs. The statute does not define when property becomes "proceeds," but the context implies that the property will have been derived from an already completed offense, or a completed phase of an ongoing offense, before it is laundered. Therefore, as a general rule, neither § 1956 nor § 1957 should be used where the same financial transaction represents both the money laundering offense and a part of the specified unlawful activity generating the proceeds being laundered.

4. Prosecutions in Receipt and Deposit Cases. In any case when the conduct to be charged as money laundering under § 1956 or § 1957, or where the basis for a forfeiture action under § 981 consists of the deposit of proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity, no indictment or complaint may be filed without prior consultation with the Asset Forfeiture and Money Laundering Section.

Explanation. One of the major concerns expressed about the use of the money laundering statutes involves a class of money laundering cases often referred to as "receipt and deposit" cases. "Receipt and deposit" cases are those kinds of cases where a person obtains proceeds from specified unlawful activity, which that person committed, and then deposits the proceeds into a bank account that is clearly identifiable as belonging to that person. In that type of transaction, there is generally no concealment involved and the transaction is conducted so that the person can use or enjoy the proceeds of the specified unlawful activity.

The concern has been expressed that "receipt and deposit" cases should not be sentenced as severely as money laundering cases involving more active forms of concealment or promotion because, arguably, the money laundering activity in "receipt and deposit" cases creates little or no additional harm to society above that which was caused by the commission of the underlying offense and, in some cases, merely constitutes the completion of the underlying offense. Such concerns have been responsible, in part, for attempts by the Sentencing Commission to amend the sentencing guidelines in a manner that would reduce the offense levels for money laundering offenses.

While §§ 1956 and 1957 apply to "receipt and deposit" transactions, for reasons of policy, "receipt and deposit" transactions should not be charged unless there are extenuating circumstances. However, a "receipt and deposit" transaction may be charged when the transaction involves other indicia of money laundering such as an effort to conceal or disguise the illegal proceeds, when a financial transaction is conducted to promote *further* unlawful activity, or when the transaction is designed to avoid a transaction reporting requirement.

9-105.600 Prosecution Standards -- Bona Fide Fees Paid to Attorneys for Representation in a Criminal Matter

Section 1957, as originally enacted, granted no exemptions based upon the kind of trade or business engaged in by a potential defendant or the purpose for which a particular "monetary transaction" was undertaken. Thus, the statute, on its face, would have allowed the prosecution of a defense attorney who knowingly received and deposited more than $10,000 in criminally derived funds as legal fees for representation of a client in a criminal case. At that time, several Congressmen expressed concern that such an application of the statute might infringe upon the Sixth Amendment right to counsel in a criminal case and contemplated adding language to the proposed statute exempting such "attorney fee" transactions. Although no prosecution of a defense attorney had been brought or submitted for consideration, Congress reversed course in 1988 and enacted an express, *but extremely limited*, exemption under § 1957 for "attorney fee" transactions. It did this by enacting § 6182 of the 1988 Act which added the following language at the end of the definition of "monetary transaction" in subsection 1957(f)(1): "but such term does not include any transaction *necessary* to preserve a person's right to

representation as guaranteed by the Sixth Amendment of the Constitution." Pub. L. 100-690, 102 Stat. 4354 (emphasis added).

There is no legislative history to clarify this provision and its scope is open to differing interpretations. The statutory exemption would allow criminal prosecution of defense attorneys who knowingly "receive and deposit" tainted funds either as part of a sham or fraudulent transaction, or as legal fees for representation of a client in any non-criminal matter. *See, e.g., Hullom v. Burrows*, 266 F.2d 547, 548 (6th Cir.), *cert. denied*, 361 U.S. 919 (1959) (Sixth Amendment right to counsel does not apply in civil litigation). It would also permit prosecution of a defense attorney who "receives and deposits" tainted funds from a third-party payor as legal fees for representation of a client in a criminal case. Such third-party payments can hardly be said to be necessary to preserve the client's right to counsel in a criminal case because, in the absence of such payments, the client would still be free to retain private counsel with his own funds or to be represented by a public defender or court-appointed counsel if he could not afford to retain private counsel.

Further, in cases involving the civil forfeiture of attorney fees, the Supreme Court has ruled that there is no Sixth Amendment right to use criminally derived property to retain counsel of choice in a criminal case. *See Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989); *United States v. Monsanto*, 109 S. Ct. 2657 (1989).

In any event, any prosecution of an attorney under § 1957 for the receipt and deposit of funds allegedly derived from a specified unlawful activity (when the fee appears to be bona fide) is a highly sensitive area and must be approached with great care. Attorneys in such situations, unlike all others who may deal with criminal defendants, may be required to investigate and pursue matters which will provide them with knowledge of the illicit source of the property they receive. Indeed, the failure to investigate such matters may be a breach of ethical standards or may result in a lack of effective assistance to the client.

Because the Department firmly believes that attorneys representing clients in criminal matters must not be hampered in their ability to effectively and ethically represent their clients within the bounds of the law, the Department, as a matter of policy, will not prosecute attorneys under § 1957 based upon the receipt of property constituting bona fide fees for the legitimate representation in a criminal matter, except if (1) there is proof beyond a reasonable doubt that the attorney had actual knowledge of the illegal origin of the specific property received (prosecution is not permitted if the only proof of knowledge is evidence of willful blindness); and (2) such evidence does not consist of (a) confidential communications made by the client preliminary to and with regard to undertaking representation in the criminal matter; or (b) confidential communications made during the course of representation in the criminal matter; or (c) other information obtained by the attorney during the course of the representation and in furtherance of the obligation to effectively represent the client.

What constitutes "representation in a criminal matter" depends on the facts and circumstances of the particular case. In deciding if representation in different but related proceedings constitutes "representation in a single matter," consideration will be given to whether the proceedings relate to investigations or cases arising out of the same facts or transactions, for example, a civil RICO case which arises out of a criminal RICO prosecution.

This prosecution standard applies only to fees received for legal "representation in a criminal matter." Attorneys who receive criminally derived property in exchange for carrying out or engaging in other commercial transactions unrelated to the representation of a client in a criminal matter or for representing a client in a civil matter should be treated the same as any other person.

Proper application of this policy requires examination of three issues: (1) what constitutes bona fide fees; (2) what constitutes actual knowledge; and (3) what evidence may be relied upon to meet the knowledge requirement of the policy.

See the Criminal Resource Manual at 2102 through 2104, for a discussion about each of these issues.

9-105.700 Prohibition on Giving Notice of the Criminal Derivation of Property

No Department attorney shall, either orally or in writing, inform an attorney who is legitimately representing a client in a criminal matter that the property the attorney is receiving is or may be criminally derived solely for the purpose of meeting the requirements of knowledge imposed by this prosecution policy or by the statute.

9-105.750 Money Laundering Offenses Under § 1956(a)(1)(A)(ii)

The Anti-Drug Abuse Act of 1988 (Pub L. 100-690) amended the money laundering provisions of 18 U.S.C. § 1956 by adding a provision which makes it a crime to conduct or attempt to conduct a financial transaction involving the proceeds of criminal activity with the intent to violate § 7201 (attempted tax evasion) or § 7206 (false tax return) of the Internal Revenue Code of 1986 (26 U.S.C.). Thus, § 6471 of the Act amends § 1956 (a)(1) as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified criminal activity--
>
> (A) (i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of § 7201 or § 7206 of the Internal Revenue Code of 1986; . . . .

According to the legislative history of the amendment (134 Cong. Rec. S17367 (daily ed. November 10, 1988)):

> [The provision] is vital to the effective use of the money laundering statute and would allow the Internal Revenue Service with its expertise in investigating financial transactions to participate in developing cases under § 1956. Under this provision any person who conducts a financial transaction that in whole or in part involves property derived from unlawful activity, intending to engage in conduct that constitutes a violation of the tax laws, would be guilty of a money laundering offense.

This amendment was intended to facilitate and enhance the prosecution of money launderers. It was not intended to provide a substitute for traditional Title 18 and Title 26 charges related to tax evasion, filing of false returns, including the aiding and abetting thereof, or tax fraud conspiracy. Consequently, appropriate tax-related Title 18 and Title 26 charges are to be utilized when the evidence warrants their use.

The use of the specific intent language set forth in 18 U.S.C. § 1956(a)(1)(A)(ii) in a proposed indictment for a violation of 18 U.S.C. § 1956 requires Tax Division authorization: (1) when the indictment also contains charges for which Tax Division authorization is required, including allegations of tax frauds (e.g., Klein-type) conspiracy; or (2) when the intent to engage in conduct constituting a violation of 26 U.S.C. § 7201 or 26 U.S.C. § 7206 is the sole or principal purpose of the financial transaction which is the subject of the money laundering count. Such authorization would be preceded by IRS Regional Counsel review in accordance with normal review procedures, except in Organized Crime Drug Enforcement Task Force cases. (*See* USAM 6-4.125 and 6-4.127).

Tax Division authorization is not required for use of such language in a money laundering indictment that does not fall in either of the above two categories. It is assumed in situations where Tax Division authorization is not requested that: (1) the principal purpose of the financial transaction was to accomplish some other covered purpose, such as carrying on some specified unlawful activity like drug trafficking; (2) the circumstances do not warrant the filing of substantive tax or tax fraud conspiracy charges; and (3) the existence of a secondary tax evasion or false return motivation for the transaction is one that is readily apparent from the nature of the money laundering transaction itself.

Section 1956 also directs that the authority to investigate money laundering violations is controlled by a Memorandum of Understanding which has been entered into by the Departments of Justice and Treasury and the Postal Service. *See* § 1956(e). Prosecutors should be aware of the provisions of this memorandum and do nothing to cause its abrogation. A copy is contained in the Criminal Resource Manual at 2186.